

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BECKLEY DIVISION**

ADAM NICHOLAS CASEY,)	
)	
Plaintiff,)	
v.)	Civil Action No. 5:08-1441
)	
OFFICER WHIMBISH, et al.,)	
)	
Defendants.)	

PROPOSED FINDINGS AND RECOMMENDATION

On December 17, 2008, Plaintiff, acting *pro se* and formerly incarcerated at FCI Beckley, located in Beckley, West Virginia, filed his Complaint in this matter claiming entitlement to relief pursuant to Bivens v. Six Unknown Federal Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 24 L.Ed.2d 619 (1971).¹ Plaintiff names the following as Defendants: (1) Mr. Whimbish, SIS Officer; (2) Ms. Underwood, R&D Officer; (3) Unknown Nurse; (4) Lieutenant Atkins; (5) Mr. Tim Kirkland, SIS Officer; and (6) Unknown Officers. (*Id.*, p. 1.) Plaintiff alleges that the above Defendants violated his constitutional rights by requiring him to provide a DNA sample. (*Id.*, pp. 3 - 8.) Plaintiff further complains that he was placed in the Special Housing Unit when he objected to the taking of his DNA. (*Id.*) As relief, Plaintiff requests that the Court issue criminal complaints against Defendants pursuant to 18 U.S.C. § 242.² (*Id.*, p. 11.)

¹ The Bureau of Prisons' Inmate Locator indicates that Plaintiff was released from custody on July 31, 2009. Pursuant to Rule 83.5 of the Local Rules of Civil Procedure, "[a] *pro se* party must advise the clerk promptly of any changes in name, address, and telephone number."

² It is well established that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973). The violation of a federal criminal statute does not provide for a private cause of action. *United States v. Oguaju*, 76 F.Appx. 579, 581 (6th Cir. 2003)(finding that the District Court properly dismissed defendant's claim filed pursuant to 18 U.S.C. §§ 241 and 242 because he had no private right of action under either of those criminal statutes); *Hester v. West Virginia*, 2008 WL

By Order entered on October 19, 2011, the undersigned ordered that “Plaintiff shall either pay the \$350 filing fee or file an updated Application to Proceed *in Forma Pauperis* by Friday, November 4, 2011. (Document No. 5.) The undersigned further notified Plaintiff as follows:

Failure of the Plaintiff to either pay the filing fee or file an updated Application to Proceed *in Forma Pauperis* by November 4, 2011, will result in a recommendation of dismissal of this matter without prejudice pursuant to Rule 41(b) of the Federal Rules of Civil Procedure and Rule 41.1 of the Local Rules of Civil Procedure for the Southern District of West Virginia.

(Id.) Plaintiff has not responded to the Court’s Order that was entered approximately two months ago. Accordingly, the undersigned has determined that Plaintiff has failed to take any steps to prosecute this action, and therefore, Plaintiff’s Complaint in this case should be dismissed.

ANALYSIS

Pursuant to Rule 41(b) of the Federal Rules of Civil Procedure and Rule 41.1 of the Local Rules of Civil Procedure for the Southern District of West Virginia, District Courts possess the

4298471, * 6 (S.D.W.Va.)(stating that “no private right of action can be inferred from 18 U.S.C. §§ 241, 242”); and *Powell v. Kopman*, 511 F.Supp. 700, 704 (S.D.N.Y. 1981)(stating that 18 U.S.C. § 242, which is the criminal analogue to the Civil Rights Act, does not create a private right of action). Thus, Plaintiff has no right to initiate criminal proceedings against Defendants pursuant to 18 U.S.C. § 242. *See Stoll v. Martin*, 2006 WL 2024387, * 2 (N.D. Fla.)(stating that “Plaintiff’s complaint fails to state a claim upon which relief can be granted under the criminal statutes 18 U.S.C. §§ 241 and 242, because a private citizen cannot initiate a federal criminal prosecution and because these statutes do not provide a private right of action for damages”); *Young v. Herald*, 2005 WL 1048117, * 8 (E.D.Ky.)(stating that the authority to initiate criminal complaints rests exclusively with state and federal prosecutors); *Kennedy v. Anderson*, 373 F.Supp 1345, 1346 (E.D.Okl. 1974)(stating that any charge brought under 18 U.S.C. § 242 “may only be initiated by a federal grand jury or a United States Attorney”); and *Dixon v. State of Maryland*, 261 F. Supp. 746 (D.Md. 1966)(Prisoner could not institute criminal proceedings against a State or its officers for violation of his rights under the color of law). Furthermore, the Court does not have the authority to direct that an individual be prosecuted. *See United States v. Batchelder*, 442 U.S. 114, 124, 99 S.Ct. 2198, 2204, 60 L.Ed.2d 755 (1979)(stating that the decision whether to prosecute and what charges to file rest in the prosecutor’s discretion); *Inmates of Attica Correctional Facility v. Rockefeller*, 447 F.2d 375 (2nd Cir. 1973)(finding that the authority to investigate and initiate criminal complaints rest exclusively with the United States Attorney).

inherent power to dismiss an action for a *pro se* Plaintiff's failure to prosecute *sua sponte*.³ See Link v. Wabash Railroad Co., 370 U.S. 626, 629, 82 S.Ct. 1386, 1388, 8 L.Ed.2d 734 (1962).

Rule 41.1 of the Local Rules provides:

Dismissal of Actions. When it appears in any pending civil action that the principal issues have been adjudicated or have become moot, or that the parties have shown no interest in further prosecution, the judicial officer may give notice to all counsel and unrepresented parties that the action will be dismissed 30 days after the date of the notice unless good cause for its retention on the docket is shown. In the absence of good cause shown within that period of time, the judicial officer may dismiss the action. The clerk shall transmit a copy of any order of dismissal to all counsel and unrepresented parties. This rule does not modify or affect provisions for dismissal of actions under FR Civ P 41 or any other authority.

Although the propriety of a dismissal “depends on the particular circumstances of the case,” in determining whether to dismiss a case involuntarily for want of prosecution, the District Court should consider the following four factors:

- (i) the degree of personal responsibility of the plaintiff;
- (ii) the amount of prejudice caused the defendant,
- (iii) the existence of a history of deliberately proceeding in a dilatory fashion, and
- (iv) the existence of a sanction less drastic than dismissal.

Ballard v. Carlson, 882 F.2d 93, 95 (4th Cir. 1989). In consideration of the first three factors, the Court finds that the delays in this case are attributable solely to the Plaintiff as the Defendants have not been required to make an appearance in this action. Pursuant to 28 U.S.C. § 1915, federal courts may authorize the commencement of an inmate's civil action *in forma pauperis* upon the inmate's

³ Rule 41(b) of the Federal Rules of Civil Procedure provides:

(b) Involuntary Dismissal: Effect. If the plaintiff fails to prosecute or to comply with these rules or any order of court, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule - - except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 - - operates as an adjudication on the merits.

filing an Application to so proceed, together with an Affidavit stating the nature of the action and Plaintiff's belief that he is entitled to redress. 28 U.S.C. §§ 1915(a)(1) and (2)(2002). "Section 1915 is intended to allow qualified litigants to proceed without having to advance the fees and costs associated with litigation." DeBlasio v. Gilmore, 315 F.3d 396, 398 (4th Cir. 2003). Plaintiff has not responded to the Court's Order directing him to either to pay the requisite \$350.00 filing fee in full or to file an Application to Proceed *in Forma Pauperis* (Document No. 5.). Plaintiff, therefore, is the sole cause of the delays in this action. With respect to the second and third factors, although the record is void of further evidence indicating that Plaintiff has a history of "deliberately proceeding in a dilatory fashion," the Court does not find that the named Defendants will be prejudiced by dismissal of Plaintiff's Complaint.⁴

In consideration of the fourth factor, the Court acknowledges that a dismissal under either Rule 41(b) or Local Rule 41.1 is a severe sanction against Plaintiff that should not be invoked lightly. The particular circumstances of this case, however, do not warrant a lesser sanction. An assessment of fines, costs, or damages against Plaintiff would be futile in view of Plaintiff's failure to pay the filing fee. Moreover, explicit warnings of dismissal would be ineffective in view of Plaintiff's failure to respond to the undersigned's Order entered approximately two months ago advising Plaintiff that the undersigned would recommend dismissal if Plaintiff failed pay the filing fee or file an updated Application to Proceed *in Forma Pauperis* (Document No. 5.). Accordingly, the undersigned has determined that this action should be dismissed without prejudice unless Plaintiff is able to show good cause for his failure to prosecute.

⁴ The Court notes that Plaintiff initiated one prior action in this Court: *Casey v. Orman*, Civil Action No. 5:08-01373.

PROPOSAL AND RECOMMENDATION


The undersigned therefore hereby respectfully **PROPOSES** that the District Court confirm and accept the foregoing findings and **RECOMMENDS** that the District Court **DISMISS** this case without prejudice for failure to prosecute and remove this matter from the Court's docket.

The Plaintiff is hereby notified that this "Proposed Findings and Recommendation" is hereby **FILED**, and a copy will be submitted to the Honorable United States District Judge Irene C. Berger. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rule 6(e) and 72(b), Federal Rules of Civil Procedure, the Plaintiff shall have seventeen days (fourteen days, filing of objections and three days, mailing/service) from the date of filing of this Findings and Recommendation within which to file with the Clerk of this Court specific written objections identifying the portions of the Findings and Recommendation to which objection is made and the basis of such objection. Extension of this time period may be granted for good cause.

Failure to file written objections as set forth above shall constitute a waiver of *de novo* review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. Snyder v. Ridenour, 889 F.2d 1363, 1366 (4th Cir. 1989); Thomas v. Arn, 474 U.S. 140, 155 (1985); Wright v. Collins, 766 F.2d 841, 846 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91, 94 (4th Cir. 1984). Copies of such objections shall be served on opposing parties, District Judge Berger and this Magistrate Judge.

The Clerk of this Court is directed to file this "Proposed Findings and Recommendation" and to mail a copy of the same to Plaintiff, who is acting *pro se*.

Date: December 22, 2011.


R. Clarke VanDervort
United States Magistrate Judge